In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 911

ANTONIO RODRIGUEZ SILVA, PETITIONER

v.

HARLAN B. CARTER, REGIONAL COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–14) is reported at 326 F. 2d 315. The opinion of the district court (Pet. App. 15–17) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1963. The petition for a writ of certiorari was filed on March 12, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the decision of the immigration authorities not to grant petitioner, an alien, permanent resident status was a gross abuse of discretion.

727-458—64

STATUTES INVOLVED

Section 249 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1259, provides:

> A record of lawful admission for permanent residence may, in the discretion of the Attorney General and under such regulations as he may prescribe, be made in the case of any alien, as of the date of the approval of his application or, if entry occurred prior to July 1, 1924, as of the date of such entry, if no such record is otherwise available and such alien shall satisfy the Attorney General that he is not inadmissible under section 212(a) insofar as it relates to criminals, procurers and other immoral persons, subversives, violators of the narcotic laws or smugglers of aliens, and he establishes that he—
>
> (a) entered the United States prior to June 28, 1940;
>
> (b) has had his residence in the United States continuously since such entry;
>
> (c) is a person of good moral character; and
>
> (d) is not ineligible to citizenship.

Section 5 of the Act of September 11, 1957 (71 Stat. 640), now incorporated as Section 212(g) of the Immigration and Nationality Act, 8 U.S.C. 1182(h) provided:

> Any alien, who is excludable from the United States under paragraphs (9), (10), or (12) of section 212(a) of the Immigration and Nationality Act, who (A) is the spouse or child, including a minor unmarried adopted child, of a United States citizen, or of an alien lawfully admitted for permanent residence, or (B) has a son or daughter who is a United States citi-

zen or an alien lawfully admitted for permanent residence, shall, if otherwise admissible, be issued a visa and admitted to the United States for permanent residence (1) if it shall be established to the satisfaction of the Attorney General that (A) the alien's exclusion would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, or son or daughter of such alien, and (B) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States; and (2) if the Attorney General, in his discretion, and pursuant to such terms, conditions, and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa and for admission to the United States.

STATEMENT

Petitioner, a native of Mexico, is married to a citizen of the United States and is the father of nine children who are citizens.[1] He claims to have first entered the United States in 1918. He last entered the United States on July 3, 1957 at Nogales, Arizona after an 18-day visit to Mexico. In 1953, the petitioner had been convicted of grand theft in California. On July 1, 1959, he was ordered deported under Section 241 (a)(1) of the Immigration and Nationality Act (8 U.S.C. 1251(a)(1)) on the ground that he was ex-

[1] His present wife whom he remarried is the mother of eight of these children, all of whom now are adults except one son who is 18 years old. The other child, born to his former second wife, is ten years old.

cludable at the time of entry under Section 212(a)(9) of the Act as an alien who had been convicted of grand theft, a crime involving moral turpitude.[2]

The present proceedings were instituted on January 27, 1961 when petitioner applied to the District Director of Immigration for permanent residence status, seeking registry under Section 249 of the Immigration and Nationality Act. Because his criminal conviction made him an excludable alien ineligible for such adjustment of status, petitioner also requested a waiver of this ground of inadmissibility under Section 5 of the Act of September 11, 1957, which authorizes a waiver if "extreme hardship" to a citizen spouse or child is shown, if the admission is not contrary to the national welfare, and if the Attorney General in his discretion consents to the waiver. After a hearing, the District Director denied relief. He concluded that the exclusion of petitioner would cause no extreme hardship, finding that between 1951 and 1961 petitioner was unable to provide the necessary support for either of his two families. He also found that petitioner's political activities exceeded whatever reasonable limits are permissible for an alien and that, even if petitioner had established extreme hardship, the favorable exercise of the Attorney General's discretion was not warranted because of the "nature and extent of his political activities, plus his marital and extra-marital relations".

[2] The validity of petitioner's deportation order is not in issue in the present case. Any question as to the propriety of this order can be raised by a petition for habeas corpus.

The Regional Commissioner disagreed with the finding of the District Director that there would be no "extreme hardship" to petitioner's citizen spouse and children. He found that petitioner's exclusion would cause such a hardship if his two teenage children "were to be deprived of his guidance and counsel during their important formative years". He refused, however, to overturn the District Director's decision because he concluded that an examination of the entire record did not reveal grounds for the exercise of discretion on petitioner's behalf. (Pet. App. 18–20). The Commissioner relied upon petitioner's "extramarital relations, his several marriages and divorces, his conviction for grand theft and subsequent reincarceration as a parole violator, his most recent trial for vote fraud which, although ending in acquittal, when considered with the unfavorable aspects of his political activities, must all enter into this decision". (Pet. App. 20).

Both courts below affirmed.

ARGUMENT

The Attorney General has discretionary power to grant permanent resident status to longtime resident aliens who meet certain statutory standards under Section 249 of the Immigration and Nationality Act, *supra*, p. 2. Aliens otherwise eligible for such adjustment of status who are disqualified either because of a criminal record or because of a past connection with prostitution may obtain a waiver of these disqualifications in the discretion of the Attorney General if they establish two statutory conditions—

extreme hardship to a citizen spouse or child and lack of harm to the national welfare or security. See Section 5 of the Act of September 11, 1957, *supra*, p. 3. The Regional Commissioner, finding extreme hardship, specifically ruled that upon the entire record petitioner did not merit the exercise of discretion in his favor.

Petitioner's argument that he was prejudiced by the failure of the Commissioner expressly to rule on whether his admission would be contrary to the national welfare and security is based on a misunderstanding of the nature of the relief sought and the scope of judicial review. The administrative agencies, even if disposed to exercise discretion in an applicant's favor, cannot do so if he does not meet the specific statutory requirements; their determination that an alien does not satisfy these requirements may be reviewed in the courts. See, *e.g.*, *Mrvica* v. *Esperdy*, No. 353, this Term, decided March 30, 1964. A finding of eligibility, however, does not compel the granting of the relief sought. The Commissioner, as representative of the Attorney General, must thereafter exercise his discretion on the basis of the whole record, and his discretion, if subject to review at all, may be reviewed only for gross abuse. See *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72 and *Jay* v. *Boyd*, 351 U.S. 345 which discuss the extent of the Attorney General's discretion in suspension of deportation cases.[3]

[3] In *Jay* v. *Boyd*, upon which petitioner relies, the court held that it was proper for the Attorney General, in exercising his discretion, to rely upon confidential information not disclosed to an alien who met the statutory prerequisites for favorable discretionary relief.

For this reason petitioner could not, as he claims, have been prejudiced by the Commissioner's failure to make an express finding on his statutory eligibility for discretionary relief. If that finding had been against petitioner, there would have been no need to exercise discretion at all. The significant fact is that on the assumption, tacit or express, that petitioner was eligible for discretionary relief the Commissioner had to and did decide whether, on the whole record, discretion should be exercised in petitioner's favor. His finding that it should not is supported by reasonable considerations and therefore is not subject to review.

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

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